FILED BY CLERK
MAY 13 2008
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. LEONARDO FRANCISCO AMADO, Appellant.	2 CA-CR 2007-0170 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-49188

Honorable Philip R. Fahringer, Judge
Honorable Hector E. Campoy, Judge

AFFIRMED

Wanda K. Day — Tucson
Attorney for Appellant

H O W A R D, Presiding Judge.

¶1 Following a jury trial in his absence, appellant Leonardo Francisco Amado was convicted of conspiracy to commit the unlawful sale of marijuana and unlawful possession of marijuana for sale. The trial court sentenced him to concurrent, partially

substantially mitigated terms of 3.5 years' imprisonment. Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), raising no arguable issues but asking that we review the entire record for fundamental error. Amado has filed two supplemental briefs.[1] We affirm.

¶2 We view the facts in the light most favorable to sustaining the convictions. *See State v. Newnom*, 208 Ariz. 507, ¶ 2, 95 P.3d 950, 950 (App. 2004). One of Amado's codefendants, Carlos Estrada-Aguilar, agreed to sell 150 pounds of marijuana to an undercover narcotics officer. The officer gave Estrada-Aguilar a vehicle to load the marijuana into, and the two agreed that another individual would accompany Estrada-Aguilar when he returned with it. When Estrada-Aguilar arrived at the agreed upon meeting place, however, the marijuana was not in the vehicle the officer had given him, but was in the trunk of a different vehicle, driven by Amado. A third codefendant was also present. Amado initially objected to the officer's "see[ing] the marijuana there in that area." Eventually, however, he opened the trunk, and the officer saw and smelled the approximately eighty-nine pounds of marijuana inside. Amado, Estrada-Aguilar, and the third codefendant then got into the car containing the marijuana, ostensibly to follow the officer to another location. Amado was again driving, and as marked police vehicles approached with emergency lights flashing, he drove "away at a high rate of speed." He led

[1]Pursuant to this court's December 21, 2007, order, Amado was given until January 28, 2008, to file his supplemental brief. He timely filed his first supplemental brief on December 24, 2007. He filed a second supplemental brief on March 10, 2008. In our discretion, we accepted that brief and granted Amado's motion to exceed the page limit. We therefore address the issues raised in both supplemental briefs.

police officers on a chase, allegedly causing a traffic accident along the way, but was eventually arrested.

¶3 Amado was indicted on five counts: (1) conspiracy to commit the unlawful sale of marijuana, (2) unlawful possession of marijuana for sale, (3) unlawful transportation of marijuana for sale, (4) fleeing from a law enforcement vehicle, and (5) leaving the scene of an accident resulting in an injury other than death or serious physical injury. Because of the unavailability of witnesses at trial, however, the state moved to dismiss counts four and five with prejudice, and the trial court granted the motion. Although the jury returned guilty verdicts on counts one through three, the trial court dismissed count three prior to sentencing, apparently in light of this court's ruling in an appeal filed by one of Amado's codefendants.

¶4 Amado argues primarily that the evidence at trial "showed only [his] 'mere presence' and was insufficient as a matter of law to support [his] convictions." We will affirm the convictions if substantial evidence supports them. *State v. Sharma*, 216 Ariz. 292, ¶ 7, 165 P.3d 693, 695 (App. 2007). "Substantial evidence is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *Id.*, *quoting State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990). "'Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction.'" *Id.*, *quoting State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996).

¶5 We determine the sufficiency of the evidence in light of the "'statutorily required elements of the offense[s].'" *State v. Teagle*, 217 Ariz. 17, ¶ 41, 170 P.3d 266, 276 (App. 2007), *quoting State v. Pena*, 209 Ariz. 503, ¶ 8, 104 P.3d 873, 875 (App. 2005). A person violates A.R.S. § 13-3405(A)(2) by possessing marijuana for sale. The illegal possession of marijuana "requires either actual physical possession or constructive possession with actual knowledge of the presence of the narcotic substance." *State v. Ballinger*, 19 Ariz. App. 32, 35, 504 P.2d 955, 958 (1973). "Constructive possession can be established by showing that the accused exercised dominion and control over the drug itself, or the location in which the substance was found." *Teagle*, 217 Ariz. 17, ¶ 41, 170 P.3d at 276. However, "a person's 'mere presence at a location where narcotics are found is insufficient to establish knowledgeable possession or dominion and control over narcotics." *Id.*, *quoting State v. Jung*, 19 Ariz. App. 257, 261, 506 P.2d 648, 652 (1973).

¶6 Likewise, "the mere presence of a person at the scene of a crime, even where the person knows that a crime is taking place, will not support a conspiracy conviction." *State v. Arredondo*, 155 Ariz. 314, 317, 746 P.2d 484, 487 (1987). Rather, conspiracy requires an "intent to promote or aid the commission of an offense," an agreement between the accused and "one or more persons that at least one of them or another person will engage in conduct constituting the offense," and "an overt act in furtherance of the offense." A.R.S. § 13-1003(A).

¶7 In this case, sufficient evidence supports both of Amado's convictions. It is undisputed that Amado's codefendant agreed to sell marijuana to the undercover officer and agreed to return to a specified meeting place with another individual to assist him. The fact that Amado drove the car containing the marijuana to meet the officer supports the inference that Amado was that other, anticipated individual. Moreover, he conversed with the officer about the appropriate location at which to view the marijuana, and he opened the trunk so the officer could see the marijuana. He was again driving when the officer was to lead Amado and his codefendants to another location to receive payment for the marijuana, and he fled when he saw marked police vehicles approaching with emergency lights flashing. More than sufficient evidence showed Amado's knowledge of and dominion and control over marijuana for sale, as well as his active involvement in a conspiracy to possess marijuana for sale.

¶8 Alternatively, Amado asserts that he was the victim of police entrapment. Unlike a "mere presence" defense, entrapment is an affirmative defense that requires a defendant to "admit by the person's testimony or other evidence the substantial elements of the offense charged." A.R.S. § 13-206(A). Amado did not admit the elements of the offenses charged; rather, his counsel argued to the jury, as he contends on appeal, that there was insufficient evidence to prove them.

¶9 Amado also challenges his indictment. To the extent we understand his argument, he appears to contend that, because the state did not prove the offenses charged in counts four and five of the indictment, he is entitled to a new finding of probable cause on all charges or dismissal of the entire case. To the extent Amado is claiming some sort of

irregularity in the grand jury proceedings themselves, his challenge is untimely and rendered moot by the dismissal of some charges with prejudice and his convictions on the others. *See State v. Agnew*, 132 Ariz. 567, 573, 647 P.2d 1165, 1171 (App. 1982); *see also United States v. Mechanik*, 475 U.S. 66, 72-73 (1986) (guilty verdict by petit jury rendered harmless "any conceivable error" in grand jury's charging decision resulting from violation of federal rule); *State v. Verive*, 128 Ariz. 570, 574-75, 627 P.2d 721, 725-26 (App. 1981) (defendant cannot raise on appeal issues relating to grand jury proceedings that did not affect subsequent trial). In any event, in light of our determination that there was sufficient evidence supporting the convictions, there is simply no legal support for this position.

¶10 Amado also contends the trial court erred by "failing to specifically question potential jurors regarding the presumption of innocence and the state's burden of proving all charges beyond a reasonable doubt." He concedes, however, that he did not object to the trial court's voir dire below, and at trial, he passed the jury panel. "A defendant who fails to object at trial forfeits the right to obtain appellate relief except in those rare cases that involve 'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005), *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). We find no error, let alone fundamental error. *See State v. Avila*, 217 Ariz. 97, ¶ 9, 170 P.3d 706, 708 (App. 2007) ("To obtain relief under fundamental error review, a defendant must prove: (1)

that error occurred; (2) that the error was fundamental; and (3) that the error was prejudicial.").

¶11 "The purpose of voir dire examination is to determine whether prospective jurors can fairly and impartially decide the case at bar." *State v. Baumann*, 125 Ariz. 404, 409, 610 P.2d 38, 43 (1980). To that end, a "trial court is required to ask prospective jurors any question it deems necessary to determine their qualifications and to enable the parties to intelligently exercise their peremptory challenges and challenges for cause." *State v. McMurtrey*, 136 Ariz. 93, 99, 664 P.2d 637, 643 (1983). However, "[t]he scope of voir dire is left to the sound discretion of the trial court." *Id*. Here, the trial court did not specifically question each of the prospective jurors individually on the subjects Amado raises.[2] The court informed them that Amado was "presumed to be innocent," that he did "not have to prove his . . . innocence or offer any evidence," and that "the State . . . must prove each part of the charge[s] against [him] beyond a reasonable doubt." The court then verified that the jurors were willing to apply the law stated to them in deciding the case. The court did not abuse its discretion or commit fundamental error in questioning or seating the jury.

¶12 Next, Amado argues that the prosecutor committed misconduct by knowingly using perjured testimony and by arguing facts that were not in evidence during closing argument. "To prove prosecutorial misconduct, the appellant must show: (1) the state's actions were improper; and (2) 'a reasonable likelihood exists that the misconduct could have

[2]The court did, in fact, question one prospective juror specifically about his ability to apply the correct burden of proof after learning the prospective juror had previously served on a grand jury.

affected the jury's verdict, thereby denying defendant a fair trial.'" *State v. Montaño*, 204 Ariz. 413, ¶ 70, 65 P.3d 61, 75 (2003), *quoting State v. Atwood*, 171 Ariz. 576, 606, 832 P.2d 593, 623 (1992). But Amado has shown no improper conduct. The prosecutor did not argue any facts not in evidence during closing argument, and there is no basis in the record to support his contention that the undercover officer committed perjury. Amado's perjury allegation is based solely on a claimed inconsistency in the officer's testimony; Amado alleges that the officer testified before the grand jury that the third codefendant had opened the trunk of the car containing marijuana, not Amado as he had testified at trial. But the officer's grand jury testimony was unclear on this point.[3] Thus there is no obvious inconsistency, let alone any evidence of perjury.

¶13 Nor is there any support for Amado's claim that he had not knowingly, intelligently, and voluntarily waived his right to a priors trial and that the trial court therefore erred by accepting his trial counsel's stipulation that he had a prior conviction. We find no such stipulation in the record. But more importantly, Amado was not sentenced as a repeat offender. Rather, the court imposed mitigated sentences within the range appropriate for a

[3]In his testimony to the grand jury, the officer stated:

> Carlos [Estrada-Aguilar] invited me to walk over to that vehicle, and in the trunk area of the vehicle all three people, later identified the driver as Leonardo Amado and the other person, Oscar Bueras-Carreno, opened the trunk of the vehicle, and inside was a large amount of marijuana which was in clear plastic bales, in dark plastic bales and covered with a blanket.

defendant who had no historical prior conviction. *See* A.R.S. §§ 13-701(C)(1); 13-702(A)(1), (D)(6); 13-702.01(B)(1).

¶14 Finally, Amado argues that he received ineffective assistance of trial counsel. Our supreme court, however, has "held unequivocally that 'ineffective assistance of counsel claims are to be brought in Rule 32[, Ariz. R. Crim. P.,] proceedings" and not on direct appeal. *State ex rel Thomas v. Rayes*, 214 Ariz. 411, ¶ 16, 153 P.3d 1040, 1043 (2007), *quoting State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002). Therefore, we do not address this claim.

¶15 Pursuant to our obligation under *Anders*, we have reviewed the record for fundamental error.[4] Having found none, we affirm Amado's convictions and sentences.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

[4]We note that Amado also asserts that the trial court erred in admitting evidence and instructing the jury. But he has not offered sufficient argument for us to address his allegations separately in this decision. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (appellant's brief must include an argument containing "the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on"); *see also State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (defendant waives claims insufficiently argued absent fundamental error). The court's instructions and admission of evidence are, however, of course, part of the record we have reviewed for fundamental error.

J. WILLIAM BRAMMER, JR., Judge